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IN THE

Supreme Court of the United States

October Term, 1978
No. 78-759

WAYNE L. KIDWELL, Attorney General of Idaho; and TOM D. MCELDOWNEY, Director of Finance of the State of Idaho,

Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,

Appellee.

On Appeal From the United States Court of Appeals for the Fifth Circuit.

Brief of Amicus Curiae State of California in Support of Appellants' Jurisdictional Statement.

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The State of California supports the request of appellants that the Court grant a hearing in this appeal from the decision of the United States Court of Appeals for the Fifth Circuit. Although California has no corporate takeover law and hence has no interest in the Fifth Circuit ruling on the merits, this State believes that the rulings of that court on the jurisdictional issues can have a substantial adverse impact on all states, and that those states which develop innovative solutions to common governmental regulatory problems will be burdened most.

Specifically, the State of California is concerned with the following questions:

"1. Whether due process or federalism principles will allow a federal court in Texas to assert personal jurisdiction over officials of the State of Idaho, one of whom took no action whatsoever and the other of whom acted solely in Idaho in his governmental capacity by enforcing Idaho law, on the theory that the official acts in Idaho had consequences or practical effects in the State of Texas.

"2. Whether a state official acting in his state solely in a governmental capacity by enforcing his own state's laws may be deemed to be 'in' or 'conducting' business in some other state for purposes of long-arm jurisdiction, state or federal, in the other state.

"3. Whether the doctrine of *Ex parte Young*, which permits suit against a state official under circumstances where the Eleventh Amendment would bar a suit against the state itself, may constitutionally be extended to subject Idaho officials acting solely within their governmental capacity in Idaho to suit in a court sited in Texas.

"4. Whether enforcement by a state official in Idaho of Idaho law which allegedly conflicts with a portion of the Securities Exchange Act of 1934 constitutes a 'violation' of said Act for purposes of federal court jurisdiction thereunder when no specific proscription thereof has been breached.

"5. Whether, in an action brought in Texas by a Texas resident against Idaho officials to invalidate an Idaho statutory scheme on the ground that it conflicts with or is preempted by the Securities Exchange Act of 1934, venue is proper in Texas either because (a) under the jurisdiction portion of the Exchange Act a 'violation' occurred in Texas or (b) under general federal venue statutes the claim against the Idaho officials arose in Texas, under a theory that the plaintiff was affected in Texas by the acts in Idaho of an Idaho official in enforcing the Idaho law."

THE QUESTIONS ARE SUBSTANTIAL.

I

The Acts of a State Official Seeking to Enforce His State's Law Within His State Is Not a Proper Subject for Litigation in a State or Federal Court Located in Another State.

As noted in Appellants' Jurisdictional Statement, neither *Ex parte Young* (1908) 209 U.S. 123 nor any case following *Young* doctrine has previously sought to extend the concept to actions brought outside the state wherein the defendant state officer holds office. *Young* attempted to balance the important constitutional principle of federalism with the equally important principle of federal judicial review of state action.

The instant decision upsets that balance. Unlike *Ex parte Young*, which simply brought the review of state action into federal court through the fiction that it was the state's officer and not the state itself which was on trial,[1] the present decision, being based upon a determination that Texas state law confers the necessary jurisdiction upon its state courts, makes it possible to compel any state to defend the constitutionality of its laws in either the state or federal courts of any other state, whenever that law has an effect on a corporation or individual located in the forum state.

[1]Even though *Ex parte Young* states that a state officer who seeks to enforce an allegedly unconstitutional state law is stripped of his official or representative character, 209 U.S. at 159-160, it is quite obvious that it is, after all, the will of the State Legislature, rather than the independent act of the state official, which has precipitated the dispute; consequently, one cannot deny that it is the state itself which is the real party in interest in such cases, regardless of the necessary semantic distinction which permits the bringing of the action in a federal court.

One of the two alternate bases for personal jurisdiction found in this case rests upon those provisions of rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure, which measure the scope of personal jurisdiction of U.S. district courts by the scope of jurisdiction afforded to state courts by the laws of the state in which the courts are located. Accordingly, the holding extends beyond the question of federal court jurisdiction alone.

The concept of federalism involves an allocation of governmental functions between a national government and the governments of the states. Those things which must be uniform throughout the country are in the sphere of the national government, and those things which can, or should, be subject to local variations based upon local needs or preferences, are in the sphere of state government. This division of responsibility can lead to diverse approaches to common problems among the states, and this diversity often provides both the states and the federal government with an opportunity to compare the effects of the different approaches. As a practical matter, however, the mere fact of difference between the laws and practices of two states may make it more difficult for one state to defend its legislation in an attack brought in courts located in another state, where the judges in both the state and federal courts are used to a different law.

Obviously, courts do interpret the laws of other jurisdictions—when they must—and will even, on occasion, rule upon the constitutionality of the laws of other states. *State of Alaska v. Petro* (Wash. 1966) 418 P.2d 755; *Bannister v. Bannister* (Md. 1942) 29 A.2d 287; *Pacific Diamond Co. v. Superior Court* (1978)

85 Cal.App.3d 871. However, requiring a state to appear in another state to defend its laws against constitutional attack would create a substantial burden to the development of novel solutions to legislative problems.

Neither the State of California nor the appellants herein seek to reverse or erode the doctrine of *Ex parte Young;* instead, we both seek to demonstrate that a decision which purports to be only a logical extension of that doctrine is in fact a virtual abandonment of the concept of federalism.

Moreover, the decision, in determining that a state official in Idaho, acting in Idaho in a purely governmental capacity, can be "doing business" in Texas, appears to ignore the long-standing distinction between proprietary acts and governmental acts. A government, when it governs, does not "do business" anywhere. When governments enter into contracts and seek to buy or sell goods or services, they do business; when they legislate or seek to enforce regulatory legislation, governments are engaging in conduct which has never been regarded as "business."

It is not unusual for a state law to affect a foreign corporation or individual who seeks to do business in the legislating state. It is also not unusual that such state laws, when enforced with respect to the in-state activities of the foreigner, will have an impact on the foreigner's activities as a whole, because American businesses are typically not structured so that activity in each state is isolated from activity in other states. Accordingly, state regulatory law, whether or not it is incompatible with the interstate commerce clause, usually will be felt by a multistate business in places outside, as well as inside, the regulating

state, and will often require action by an officer or employee of the business who is physically located outside of the regulating state.

The instant decision suggests that if two Idaho officials had chosen to write to a Texas company proposing to undertake an activity in Idaho on the same day, each seeking compliance with a different state law, one might have established "minimum contacts" in Texas and the other might not, depending upon the nature and scope of the law being enforced. See *Great Western United Corp. v. Kidwell* (5th Cir. 1978) 577 F.2d 1256, 1269-1270, reproduced in Appellants' Jurisdictional Statement at A-22 to A-24. This distinction has the effect of making the jurisdictional determination hinge upon an analysis of the foreign statute by the court. Such an approach appears to create a substantial risk that a case will be decided on the merits as a part of the jurisdictional problem-solving process. It is submitted that it is difficult to analyze a statute to determine its regulatory effect without at the same time determining the extent to which it burdens commerce. In this regard, see the discussion in the dissenting opinion at 577 F.2d 1291-1292.

II

It Is Inappropriate to Characterize an Attempt to Enforce State Law as a Violation of a Preempting Federal Law.

The second basis of jurisdiction asserted by the Fifth Circuit Court of Appeals is that attempted enforcement of the Idaho Corporate Takeover Law is a violation of the Securities Exchange Act of 1934 merely because the Idaho law is found to have been preempted by the Securities Exchange Act. As noted above, the State

of California takes no position on the merits of this case and hence will not discuss the preemption issue. However, assuming that the Idaho law was preempted and thus not enforceable, it still appears to be inappropriate to characterize the acts of the Idaho officials as violations of federal law when the federal law includes no express prohibition for the conduct.

The instant decision treats section 28 of the 1934 Act, 15 U.S.C. § 78bb, which reserves to the states the power to regulate securities, as a prohibition of that which is not granted. Quite clearly, however, if the Idaho law is invalid by reason of conflict with any portion of the 1934 Act, it would still be invalid absent section 28; accordingly, it is sophistic to claim that section 28 is "violated" by enforcing invalid state laws.

The comparison with the profit recapture provisions for insider short-swing trading is improper; in that case, Congress has clearly intended to create a cause of action, which in turn must be brought somewhere. It is entirely proper to use the jurisdictional provisions of the Act to determine the appropriate place in such a case.

It is submitted that determinations of *in personam* jurisdiction or venue in cases involving questions of preemption of state law by federal law should normally be made without regard to jurisdictional provisions within the federal law unless Congress has expressly considered actions asserting preemption. In all other cases, jurisdiction and venue with respect to actions seeking to invalidate a state law on preemption grounds should be no different than in actions seeking to invalidate state laws on constitutional grounds. There is no rational basis for distinguishing between the two types of claim.

Conclusion.

For the foregoing reasons, amicus curiae the State of California respectfully urges that the Court note probable jurisdiction of the appeal herein.

Respectfully submitted,

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